In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 34.

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ex rel,
Virginia State Bar,
Respondent.

On Writ of Certiorari to
The Supreme Court of Appeals of
the Commonwealth of Virginia

BRIEF FOR THE RESPONDENT

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ABBREVIATIONS

PC	Petition for Writ of Certiorari
PA	Appendix to Petition for Certiorari
RBO	Respondent's Brief In Opposition
R	Transcript of Record
PB	Brief for Petitioner
Pl. Ex.	Plaintiff's Exhibit

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OPINION BELOW

While it is true that no opinion was rendered by either the Supreme Court of Appeals of Virginia or the Chancery Court of the City of Richmond in this case, the findings of fact by the Chancery Court made in its final decree of January 29, 1962 (R. 25-28), constitute the factual basis therefor. The order of the Supreme Court of Appeals of Virginia of June 12, 1962 (R. 35) denying the appeal recited: "The court being of opinion that the said decree

is plainly right, doth reject said petition, and refuse said appeal and supersedeas, the effect of which is to affirm the decree of the Chancery Court.'"[1] Petition to rehear that order was denied on August 31, 1962 (R. 36). 203 Va. lxx.

JURISDICTION

Respondent denies the jurisdiction of this Court to review the decree of January 29, 1962, of the Chancery Court of the City of Richmond (R. 25-28) under 28 U.S.C.A. § 1257 (3) because no question is presented that may be reviewed by this Court thereunder. The questions stated by the petitioner (PB 2) are not in dispute nor do they draw in question any matter upon which the jurisdiction of this Court is claimed. Respondent so contended in its Brief In Opposition (RBO 1-2). The writ of certiorari should be dismissed as improvidently awarded.

STATUTES INVOLVED

Petitioner has failed to set out the following Virginia statutes and canons of professional ethics:

Va. Code, 1950, § 54-42. Who may practice law.—The following persons may practice law in this State:

All persons, male and female, who have heretofore

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[1] Va. Code, 1950, § 8-476. "*** If the court shall deem the judgment, decree or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained." See also *Morgan* v. *Com.* (1913), 115 Va. 943, 79 S.E. 388.

obtained, or may hereafter obtain, a license to so practice under the laws of this State, and whose license has not been revoked, and who have paid the license tax prescribed by law.

Any person duly authorized and practicing as counsel or attorney at law in any state or territory of the United States, or in the District of Columbia, may for the purpose of attending to any case he may occasionally have in association with a practicing lawyer of this State practice in the courts of this State, in which case no fee shall be chargeable against such nonresident attorney. (Code 1919, § 3408; 1920, p. 66; 1922, p. 654; 1938, p. 334.)

Va. Code, 1950, § 54-83.1. Injunction against running, capping, soliciting and maintenance.—The Commonwealth's attorney, or any person, firm or corporation against whom any claim for damage to property or damages for personal injuries or for death resulting therefrom, is or has been asserted, may maintain a suit in equity against any person who has solicited employment for himself or has induced another to solicit or encourage his employment, or against any person, firm, partnership or association which has acted for another in the capacity of a runner or capper or which has been stirring up litigation in such a way as to constitute maintenance whether such solicitation was successful or not, to enjoin and permanently restrain such person, his agents, representatives and principals from soliciting any such claims against any person, firm or corporation subsequent to the date of the injunction. (1954, c. 707.)

Rules of Court, Part Six, Integration of The State Bar, II. Canons of Professional Ethics:

* * *

28. Stirring Up Litigation, Directly or Through Agents.—It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attaches* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

* * *

35. Intermediaries.—The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities

and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

* * *

47. Aiding the Unauthorized Practice of Law.—No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

QUESTIONS PRESENTED

Petitioner fails to state the primary and controlling question presented:

Whether the decree of the Chancery Court of the City of Richmond does in fact enjoin, restrain or deprive petitioner of the rights claimed, to-wit, "the right to make known to its members generally, and to injured members and survivors of deceased members in particular, first, the advisability of obtaining legal advice before making settle-

ment of their claims, and second, the names of competent attorneys to handle such claims," whether protected by the First or Fourteenth Amendment or specifically authorized by the Railway Labor Act (PB 2).

Respondent contends that the decree does not in fact enjoin, restrain or deprive the petitioner of the rights so claimed but does enjoin the operation by the petitioner of a plan which through conspiracy on its part with a few selected lawyers results in fact in an intended monopoly and control of all the F.E.L.A. business in the United States of its members in the hands of those few selected lawyers.

STATEMENT OF THE CASE

Petitioner's statement (PB 11-19) is not only inadequate to acquaint this Court with the factual background necessary to an understanding of the problem presented but misrepresents the factual basis of the Chancery Court decree. Petitioner has selected and put together certain isolated parts of the record to create a favorable but untrue picture of its operations which only a full re-statement of the case can correct.

THE LEGAL AID DEPARTMENT UNDER PRESIDENT WHITNEY, 1930-1949

In 1930 petitioner's president, Alexander F. Whitney, established a Legal Aid Department at the Grand Lodge of the Brotherhood of Railroad Trainmen pursuant to a plan which had been proposed to the four leading railway unions by H. F. Fuller, their National Legislative Representative, at various times subsequent to the enactment of

the Federal Employers' Liability Act. Objections by the Order of Railway Conductors prevented adoption of the plan as a joint undertaking (Pl. Ex. 17 (c), R. 465, 806-809; Pl. Ex. 2, R. 442, 742-750; Pl. Ex. 3, R. 444, 751-755; Pl. Ex. 4, R. 445, 756-760; Pl. Exs. 12 and 12a, R. 457, 779-785; Pl. Ex. 13, R. 458, 785-790; Pl. Ex. 14, R. 458, 791-792; Pl. Ex. 15, R. 459, 792-795; Pl. Ex. 16, R. 459, 795-799).

In its inception the plan provided: for a Legal Aid Bureau at the Grand Lodge under the supervision of the president for the purpose of advising members "relative to their rights respecting claims for damages" and assisting them "in negotiating settlements"; for each local lodge to appoint a particular person to report all major injuries or deaths to the Bureau on forms provided by it[3] (Pl. Ex. 6, R. 448, 764-765; Pl. Ex. 7, R. 451, 766-769; Pl. Ex. 8, R. 453, 770-773; Pl. Ex. 9, R. 453, 774-775); for the president to appoint Regional Investigators to whom such reports were referred and who made further investigation if necessary to enable the Bureau to determine questions of liability and to advise the injured member of his legal rights; for the selection and appointment by the Bureau of lawyers at strategic points in the United States with whom the Bureau made contracts for free advice to its members to enable them to make direct settlements of their claims if possible and to represent its members in suits when direct settlement failed for a contingent fee fixed by the Bureau, a part of which the selected attorneys

[3] For more efficient reporting, this duty was subsequently imposed on the secretary of each local lodge by constitutional interpretation (Pl. Ex. 1, R. 439, 733-734; Pl. Ex. 1-B, R. 442, 735-739; Pl. Ex. 10, R. 453, 776-777).

paid over to the Bureau to cover its operating expenses; for each selected attorney to advance the necessary expenses and cost of litigation, subject to the approval of the Bureau; for the Bureau to give "the regional lawyers a reasonable assurance of a sufficient volume of Brotherhood business to warrant the rendering of proper service on the basis of compensation agreed upon";[3] for the report by each Regional Attorney of the outcome of each case, including the amount of settlement or verdict; and for suitable advertisement and publicity concerning the plan and the names of Regional Counsel available to render the services (Pl. Ex. 2, R. 442, 746-750; Pl. Ex. 3, R. 444, 753-755; Pl. Ex. 4, R. 445, 757-760; Pl. Ex. 5, R. 445, 760-763; Pl. Exs. 12 and 12a, R. 457, 782-785; Pl. Ex. 13, R. 458, 785-790; Pl. Ex. 14, R. 458, 791-792; Pl. Ex. 15, R. 459, 792-795; Pl. Ex. 72, R. 586, 905-913).

Under President Whitney's authority and at his direction, T. J. McGrath, then petitioner's General Counsel, established the Legal Aid Department and selected Regional Counsel (Pl. Ex. 17 (c), R. 465, 809-813). No study of the canons of legal ethics was made with respect either to the establishment of the plan or in the selection of Regional Counsel. Mr. McGrath replied in response to the suggestion that the lawyers selected were those who had been engaged in ambulance chasing.

> "That is not a fact, generally speaking. We have men, wherever we have been able to secure them, who are experienced in the trial of damage suit cases.

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[3] It was provided that "the charges in such cases will be from thirteen to thirty percent less than is now charged for similar service" (Pl. Ex. 4, R. 445, 759).

> Now, you can differentiate between ambulance chasers. I don't think a great deal of odium attaches to ambulance chasing where the fellow handles his clients with decency and treats other lawyers on a fair plane when he solicits business. I consider it is unethical, but I mean from a purely moral standpoint. We sought to select men who may have used certain means to induce clients to come in there, but who would stand the scrutiny of any fairminded man as to whether their practices were reasonably decent." (Pl. Ex. 17 (c), R. 465, 814).

McGrath confirmed that the actual operation of the plan provided initial advice as to the value of the case and what settlement to demand and, on failure of settlement, reference to Regional Counsel for handling on a 20% contingent fee, one-fourth of which was paid to the Bureau, at first directly by counsel and later by assignment (Pl. Ex. 17 (c), R. 465, 815-823).

In April 1931, following the inauguration of the plan on May 1, 1930, a complaint was filed in the Common Pleas Court of Cuyahoga County, Ohio,[4] against the second firm appointed as Regional Counsel by President Whitney, which brought petitioner's Legal Aid plan under court scrutiny for the first time and questioned the propriety of participation in it by any lawyer (Pl. Ex. 17 (a) and (b), R. 465, 800-805). Both President Whitney and Mr. McGrath testified in that proceeding, describing the plan and its operation as hereinabove indicated (Pl. Ex. 17 (c), R. 465, 809, 822). On May 4, 1932, another case was com-

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[4] *In re Petition of Committee on Rule 28 of the Cleveland Bar Assoc.* (1933), 15 Ohio L. Abs. 106.

menced in the same court,[8] in which the Brotherhood was a defendant, again attacking the plan and its operation (Pl. Ex. 18, R. 481, 825-829). In the latter case, the petitioner then admitted solicitation, fee splitting and all the "objectionable practices" which it now admits in the case at bar continued until April 1, 1959. The significant point is that the *Dworken Case* was dismissed in reliance upon the petitioner's promise to stop those practices and on the good faith of its "protestation" that such practices had already been eliminated:

> "Upon the representation by counsel for defendant, that said defendant has, in good faith, adopted said new plan of operation, this action is, by consent of both parties, dismissed at the costs of the defendant." (Pl. Ex. 18, R. 481, 827-828).

Petitioner repeats the same protestation in the case at bar (PB 18-19; R. 6, 7-8, 9-10, 51-52).

Even more significant is the testimony of McGrath in the first Ohio case that the objectionable practices were not being carried on "in Ohio right now" because of the two pending cases, but that petitioner was still employing those practices "in cases arising outside of Ohio and in the State of Ohio in minor cases, in Ohio" (Pl. Ex. 17 (c), R. 465, 816, 820, 825). With respect to the splitting of fees, McGrath said that "we agreed not to take any of that money, but hold it in abeyance until the thing was settled" (Pl. Ex. 17 (c), R. 465, 824).

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[8] *Dworken* v. *Brotherhood of Railroad Trainmen Grand Lodge* (1932), No. 354,975, Court of Common Pleas, Cuyahoga County, Ohio.

McGrath agreed that the result of the plan would be a monopoly of the F.E.L.A. business of its members in each Region for the selected Regional Counsel in that Region:

> "Mr. Morris: But if the men finally get to the point of adopting your plan in your union it will mean that in this region Newcomb, Newcomb and Nord will have a monopoly on those cases?
>
> "The Witness: Yes, sir.
>
> "Mr. Morris: That's right, isn't it?
>
> "The Witness: If they cooperate with us in our plan to carry out our suggestion, cases will not go to any other lawyers or [of] members of our Brotherhood, unless we should broaden our list." (Pl. Ex. 17 (c), R. 465, 824).

The definite intent of the petitioner to accomplish such a monopoly was frankly conceded by McGrath:

> "Q. I asked you whether you have any other plan?
> "A. Well, eventually if we can't get it that way, we will arrange for an assessment on the members, I suppose, to do it as we are doing now, paying it out of the protective fund." (Pl. Ex. 17 (c), R. 465, 823).

Notwithstanding the "protestation" and agreement in the *Dworken Case* in 1932, petitioner now admits that it continued those objectionable practices until April 1, 1959 (R. 5-6, 7-8, 9-10, 51-52, 434, 436).

In 1932 the intermediate appellate court of Illinois decided that participation by an attorney in the petitioner's

plan did not defeat his attorney's lien.[6] While it is true that the opinion in that case also approved petitioner's plan, that approval was subsequently nullified by the Supreme Court of Illinois in 1958 by the opinion on which the petitioner now chiefly relies.[7] In 1933 the U. S. District Court for the Eastern District of New York, in disciplinary proceedings against a Regional Counsel,[8] in which the Brotherhood participated as *amicus curiae*, censured the attorney, condemned the plan and had the following to say about the *Ryan Case:*

> "For all that is shown by the opinion referred to, the superior court of Cook county, Ill., may not require adherence to the Canons of Ethics of the American and New York State Bar Associations, which after due consideration have been adopted as embodying the professional standards required to be maintained by the bar of this court." (5 F. Supp., at p. 467).

In 1946 the U. S. District Court for the Eastern District of Missouri was asked to remove Regional Counsel appearing for the plaintiff in a pending F.E.L.A. case[9] on the ground of his participation in petitioner's Legal Aid Plan. In his defense Regional Counsel admitted that petitioner's Legal Aid Plan had operated from its inception

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[6] *Ryan* v. *Penna. R. Co.* (1932), 268 Ill. App. 364.

[7] *In re Brotherhood of Railroad Trainmen* (1958), 13 Ill. 2d 391, 150 N.E.2d 163.

[8] *In re O'Neill* (1933), 5 F. Supp. 465.

[9] *Young* v. *GM&O Rwy. Co.* (1946), No. 3957, U.S.D.C., E.D. Mo.

until June 15, 1946, as originally set up with all of the objectionable features condemned in prior court decisions (and despite the assurances given in the *Dworken Case*) and stated that the plan had been brought to an end on June 15, 1946, because of widespread criticism by courts, lawyers and bar associations (Pl. Ex. 21, R. 485, 833-838, 842).[10] In support of that defense Regional Counsel filed two letters from President Whitney dated June 15, 1946, one to the Regional Counsel involved in that case[11] and the other addressed to all Regional Counsel[12] denying fee splitting by the petitioner with its Regional Counsel and giving notice that the petitioner would not accept any part of Regional Counsel's fees in the future (Pl. Ex. 21, R. 485, 831, 833-834).

Notwithstanding President Whitney's "protestation" in 1946, petitioner's admissions in the case at bar establish that fee splitting did continue until April 1, 1959 (R. 5-6, 7-8, 9-10, 51-52, 434, 436).

Regional Counsel also explained in the *Young Case* (Pl. Ex. 21, R. 485, 835-837) that prior to June 15, 1946, Regional Counsel had agreed with petitioner to charge its members a contingent fee of 25% of the gross recovery, from which they paid all expenses and forwarded an amount equal to 4% of the gross recovery to the petitioner's Legal Aid Department which advertised Regional Counsel

[10] Interstate Commerce in Damage Suits, Journal of the American Judicature Society, February 1946, p. 135.

[11] The same as Ex. 2 with Pl. Ex. 21, R. 485, 833.

[12] The same as Ex. 3 with Pl. Ex. 21, R. 485, 834.

and the Legal Aid Plan extensively in the Brotherhood publications (Pl. Ex. 72, R. 586, 905-923, 933-945).

The plan also came under attack in Tennessee in 1946.[13]

In 1948 Regional Counsel, Joseph B. McGlynn and others, were enjoined in North Carolina from advertising, soliciting and giving legal advice in that state and from transporting cases out of North Carolina (Pl. Ex. 24, R. 490, 842-843).

Bernard F. Savage, a Baltimore lawyer, was appointed by President Whitney on January 19, 1937, Regional Counsel for the region including Virginia, West Virginia, Maryland and the District of Columbia, and arrangements were made for him to be listed as such in the February issue of *The Railroad Trainman*. Savage agreed to operate under the Brotherhood plan and subscribed to the Rules and Regulations governing its operation on February 6, 1937. No lawyer other than Savage has been appointed as Regional Counsel for Virginia since that date (R. 61; Pl. Ex. 32, R. 530, 884; Pl. Ex. 33, R. 530, 884-887; Pl. Ex. 34, R. 530, 887-888; Pl. Ex. 35, R. 531, 888-891).

THE LEGAL AID DEPARTMENT UNDER PRESIDENT KENNEDY, 1949 - APRIL 1, 1959

William P. Kennedy succeeded President Whitney in July of 1949 (R. 38). Pursuant to his sole power as president to run the Legal Aid Department, he reappointed all

[13] *Reynolds* v. *GMO & TP Rwy.* (1946), No. 772, U.S.D.C., E.D. Tenn.

Regional Counsel that were serving under President Whitney, including Bernard M. Savage (R. 39-41; Pl. Ex. 36, R. 531, 892; Pl. Ex. 37, R. 532, 893; Pl. Ex. 82, R. 660, 1026).

When Kennedy took office, the contribution of each Regional Counsel to the maintenance of the Legal Aid Department was determined on the basis of "a pro rata assessment in accordance with the volume of business that he produced during that particular year" as compared to the total volume of business produced by all Regional Counsel, i.e., total gross recoveries in each year (R. 43-44). The books show that gross to have been $8,688,409 in 1955. The 25% fee on that amount was $2,172,102.25, out of which Regional Counsel contributed to the Legal Aid Department $57,000 (Pl. Nelson Ex. A, R. 504, 1030). The complete detail of the financial connection between Regional Counsel and the Legal Aid Department of the Brotherhood for the years 1953 through 1958 is shown by its books (Pl. Nelson Ex. A, R. 504, 1027-1033; Pl. Chase Ex. E, R. 646, 1091-1199).

Kennedy had barely taken office when the Legal Aid Plan in its historical entirety, including the 1946 rearrangement,[14] was severely criticized by the Supreme Court of California in Bank, which held that participation in the plan by Regional Counsel violated the Rules of Professional Conduct of the California State Bar.[15] In 1952 the plan was again assailed in Tennessee[16] where a Regional Investi-

[14] See discussion of *Young Case* and Whitney letters, *supra*, pp. 12-14.

[15] *Hildebrand* v. *State Bar of California* (1950), 36 Cal. 2d 504, 225 Pac. 2d 508.

[16] *Doughty* v. *Grills*. (1952), 37 Tenn. App. 63, 260 S.W. 2d 370.

gator and a member of the Brotherhood were enjoined. In that same year, 1952, Regional Counsel Hildebrand was enjoined by the District Court of El Paso County, Texas,[17] from engaging in the same practices for which the California court had condemned him two years before.

In 1956 the United States Court of Appeals for the Tenth Circuit[18] found that Regional Counsel Davis, Rerat, Yaeger & Lush, of Minneapolis, Minnesota, and the Brotherhood's Regional Investigator, Pat Maroney, of Kansas City, Missouri, were guilty of seeking out persons known to have F.E.L.A. claims and soliciting them to employ Regional Counsel by carrying printed contingent fee contracts and as an inducement to signing such contracts stating that Regional Counsel would defray all expenses and make cash advances for the client's support and maintenance during the pendency of the claim. These practices in furtherance of the Brotherhood's plan, the Court said, "amounted to aggravated violation of well recognized ethical and professional standards of long duration and virtually universal observance".

On March 22, 1954, President Kennedy appointed as Chief Clerk of the Legal Aid Department Charles R. Maher, a former Regional Investigator assigned to Edward B. Henslee, Sr., General Counsel of the Brotherhood and its Regional Counsel in Chicago. Maher had temporarily served as manager of the Department in 1947 and 1948 (R. 697-698; Pl. Ex. 78, R. 588, 983). Maher testified

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[17] *Grievance Ctee. of the State Bar of Texas, 16th Dist.* v. *Hildebrand* (1952), No. 72581, Dist. Ct. of El Paso County, Texas, 41st Jud. Dist.

[18] *The Atchison, Topeka and Santa Fe Rwy. Co.* v. *Jackson* (C.A. 10-1956), 235 F.2d 390.

that there were no changes in the operation of the Legal Aid Department from 1947 (Whitney then President) until April 1, 1959 (Kennedy then President) and described in detail how the objectionable aspects of the plan actually operated during that period (Pl. Ex. 78, R. 588, 983-997; R. 5-6, 7-8, 9-10, 51-52, 434, 436). Excerpts from *The Railroad Trainman* and other Brotherhood publications conclusively confirm Mr. Maher (Pl. Ex. 72, R. 586, 905-945; Pl. Ex. 73A, R. 586, 949-950).

Other proceedings challenging the plan were being commenced. On May 21, 1957, petitioner filed answers by President Kennedy to interrogatories propounded in such a case pending against the petitioner and others in Spokane County, State of Washington (Pl. Ex. 77, R. 588, 978-981).[19] In those answers petitioner formally admitted: that it then operated a Legal Aid Department; that it then had 15 Regional Counsel; that the chairmen of its local lodges were then required to contact injured members or their survivors and to "urge such members, or such survivors of members to employ regional counsel to initiate litigation or negotiate for settlement", to arrange either to have Regional Counsel call on such claimants or to bring such claimants to Regional Counsel, to assure such claimants that Regional Counsel would not charge more than a contingent fee of 25% and would pay all expenses, and in proper cases to make assurance of cash advances for hospital and living expenses; that local lodge chairmen were compensated by Regional Counsel for such services; that Regional Counsel contribute ratably to the expenses of the Legal Aid Department and also to convention expenses of

[19] *Opendack* v. *Davis, Rerat, Yaeger, Lush, Brotherhood of Railroad Trainmen*, No. 146745, Sup. Ct., Spokane County, Washington.

the Brotherhood when Legal Aid matters are discussed. Those formal answers to interrogatories specifically state that it is not only the *privilege* of the chairmen of local lodges to recommend but that *it is their duty* "under the Brotherhood's constitution, by-laws, etc." to *urge* consultation with Regional Counsel and that they do in fact *urge* injured members or their survivors to *retain* Regional Counsel. (Pl. Ex. 77, R. 588, 980, pars. 7 and 8).

That most candid and revealing admission was identified as Pl. Ex. 3 with President Kennedy's testimony in another California case in which Hildebrand was again a defendant and Kennedy and the Brotherhood were parties (Pl. Ex. 77, R. 588, 960-981, 977).[20]

Kennedy conceded that the investigations initiated by him when he took office in 1949 had disclosed that something had to be done "in order to keep the good name of the Brotherhood of Railroad Trainmen highly in a respectable condition" (R. 46-47). About that time, in 1953, the Philadelphia Bar Association complained to the Chicago Bar that Edward B. Henslee, Jr. (son and partner of Edward B. Henslee, Sr., who was then not only Regional Counsel for the Chicago area but also General Counsel for the petitioner), was soliciting personal injury claims in Pennsylvania. A complaint was then filed in 1954 by the Grievance Committee of the Chicago Bar against Henslee, Sr., Henslee, Jr., Monek and Murray (R. 49). Petitioner then relied upon the decision in the *Ryan Case*,[21] cited in petitioner's brief (PB 23-24), to justify the solicitation. It

[20] *So. Pac. Co. v. Hildebrand, et al*, No. 727273, Sup. Ct., Los Angeles County, Calif.

[21] See footnote 6, p. 12.

was then in 1955 that Henslee, Sr., petitioner's General Counsel, petitioned the Supreme Court of Illinois on its behalf to approve by declaratory judgment the Brotherhood's Legal Aid Plan (R. 49). It is obvious that the purpose of this action was to forestall the Chicago Bar Association proceeding in anticipation that the Supreme Court of Illinois would take the same view of the plan as the Illinois intermediate appellate court had taken in 1932 in the *Ryan Case*.[32]

The opinion in the proceeding instituted by Henslee, Sr.,[33] upon which petitioner has so heavily relied, reviewed petitioner's Legal Aid Plan and remarked that the prior decisions, excepting the *Ryan Case*, had disapproved the plan. The opinion directed special attention to the Illinois statute[34] against solicitation by laymen which had been enacted in 1957 while the matter was pending before the Illinois Supreme Court. It was pointed out in the opinion that the statute as originally proposed had contained a provision exempting labor organizations from its prohibition and that the exemption had been defeated in both houses of the Illinois General Assembly. This statute and its history was said by the court to express "a policy contrary to that stated in the Ryan case". The court declined disciplinary action against the Brotherhood for the following reason:

> "So far as the disciplinary aspects of the matter are concerned, we are of the opinion that because of the

[32] See footnote 6, p. 12.

[33] *In re Brotherhood of Railroad Trainmen* (1958), 13 Ill. 2d 391, 150 N.E. 2d 163.

[34] Ill. Rev. Stat. 1957, Chap. 13, par. 15.

> decision of the Appellate Court in *Ryan* v. *Pennsylvania Railroad Co.* 268 Ill. App. 364, proceedings looking toward the imposition of discipline should not be pursued. (*In re Luster*, 12 Ill. 2d 25.) For the same reason we are of the opinion that time should be allowed the Brotherhood to reorganize its legal aid department along the lines outlined in this opinion. The standards here stated will therefore become effective on July 1, 1959." (13 Ill. 2d, at p. 398, 150 N.E. 2d, at p. 168.)

The Illinois decision was handed down on March 20, 1958, and, notwithstanding the court's condemnation of the plan, petitioner was allowed until July 1, 1959, to put its house in order: one year, three months and eleven days in which to instruct *only sixteen lawyers* to comply. Kennedy's letter directing compliance on April 1, 1959, was not sent until March 16, 1959, allowing less than 15 days as sufficient for that purpose (Pl. Ex. 75, R. 587, 958-959). President Kennedy claims great credit for his decision to direct compliance with the Illinois decision on April 1, 1959, three months earlier than required (R. 52) though plainly informed by that decision that the continued operation of his Legal Aid Department without change during the one year and 11 days that followed the decision was wrongful. This attitude is in exact accord with the statement in 1932 by General Counsel McGrath of the Brotherhood's avowed policy not to cease its illegal practices except when and where it is compelled to do so (Pl. Ex. 17 (c), R. 465, 820, 824-825; *supra*, p. 10).

The standards laid down by the Illinois decision and the proof of petitioner's failure to observe them, even in Illinois, will be later discussed (*infra*, pp. 34-36). As the

evidence will show, Kennedy's letter of March 16, 1959 (Pl. Ex. 75, R. 587, 958-959) and Whitney's letter of June 15, 1946 (Pl. Ex. 23, R. 486, 834)[25] professed the identical intention and were equally ineffective, petitioner having already admitted that there was no cessation of the objectionable practices as result of the Whitney letter (R. 5-6, 7-8, 9-10, 51-52, 434, 436; Pl. Ex. 78, R. 588, 983-984, 983-997). In fact, the Brotherhood proclaimed to its members on June 9, 1958, through its official publication that the Illinois decision "was a major victory" and stated that the court of seven judges had "unanimously placed its stamp of approval on the legal aid program of the Brotherhood of Railroad Trainmen" (Pl. Ex. 72, R. 586, 927).

During this period further attacks were being made on Regional Counsel and the Legal Aid Plan culminating after the Illinois decision in consent decrees generally following the Illinois decree with variations.[26]

Regional Counsel Davis, Rerat, Yaeger and Lush were again involved in the Iowa Case[27] as well as Regional Investigator, Gail Clinkenbeard, the same firm whose activities were so severely criticized by the United States Court of Appeals for the Tenth Circuit[28] and who were parties

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[25] The same as Ex. 3 with Pl. Ex. 21, R. 485, 834.

[26] *White et al* v. *Davis* (1959), No. 36175, Dist. Ct. of Pottawathamie County, Iowa; *State, ex rel Beck* (1960), 170 Neb. 376, 103 N.W. 2d 136; *State, ex rel Oklahoma Bar Assn.* v. *Brotherhood of Railroad Trainmen, Kennedy, Maher, et al* (1960), No. 38373, Supreme Court of Oklahoma; *Hulse* v. *Brotherhood of Railroad Trainmen* (Mo. 1960), 40 S.W. 2d 404.

[27] See footnote 26.

[28] *Supra*, p. 16, and footnote 18, p. 16.

defendant with the Brotherhood in the State of Washington.[29]

The Oklahoma Case[30] was announced ready for hearing when the Brotherhood, Kennedy, Maher and the other defendants stipulated their agreement to a consent decree which on April 26, 1960, adopted the Illinois decision in its entirety and in addition permanently enjoined the Brotherhood, its officers, agents, servants and employees "from representing, or attempting to represent any person in any legal matter or proceeding whatsoever in the State of Oklahoma" and permanently enjoined all of the defendants "from engaging in the practice of law in any manner whatsoever in the State of Oklahoma" (Pl. Ex. 29, R. 495, 855-858). Petitioner now appears to consider too broad and vague the very prohibitions to which it then consented (PB 14, 33, 40-41).

In the Missouri Case[31] the petitioner again stipulated for a consent decree entered by the Supreme Court of Missouri, En Banc, on November 14, 1960 (Pl. Ex. 30, R. 496, 859-879). Regional Counsel Lush, of Davis, Rerat, Yaeger and Lush, was again involved. G. A. McNurlan, a Regional Investigator, later to be referred to, was also a defendant. The stipulation admitted that the petitioner was governed by the Grand Lodge and "conducts its business functions and operations through subordinate lodges, sometimes referred to as 'local lodges', located in the various states of the Union" (Pl. Ex. 30, R. 496, 860). The oper-

[29] *Supra*, pp. 17-18, and footnote 19, p. 17.

[30] See footnote 26, p. 21.

[31] See footnote 26, p. 21.

ation of the plan in accordance with its intent and purpose heretofore shown was again recited in detail (Pl. Ex. 30, R. 496, 860-873). An outstanding fact agreed to by all the defendants in that case, including this petitioner, is as follows:

> "The respondent Lush paid to the Brotherhood, *as his share of the expense of operation of the Legal Aid Department*, a total of $31,825.68 during the period from January 1, 1956, to *March 25, 1960*." (Italics ours. Pl. Ex. 30, R. 496, 873).

The Court will not fail to observe the significance of the date, March 25, 1960, as the last contribution made by Regional Counsel Lush to the Legal Aid Department in the light of the now obviously false "protestation" by pleadings, affidavit of May 11, 1960, and testimony in the case at bar that "No amount has been contributed or will be contributed after April 1, 1959" (R. 9, 5-6, 7, 51-52). Petitioner obviously did not dare to so contend in the Missouri consent decree of November 14, 1960, in which its protestation is merely: "The respondents, and each of them, have represented that they *presently* are not engaging in any of the practices condemned in the above quoted [Illinois] decision." (Italics ours. Pl. Ex. 30, R. 496, 874).

It is important to note that petitioner *consented* in the Missouri decree to the following among other permanent injunctions: from telling any person that he has a cause of action, the amount he was entitled to recover, where suit should be brought; from doing any other thing that constitutes the practice of law in Missouri; and from making unsolicited calls for the purpose of "recommending or urging the employment of a lawyer" (Pl. Ex. 30, R. 496, 875).

The Nebraska proceeding[33] resulted also in a consent decree on May 6, 1960 (Pl. Ex. 28, R. 493, 844-851) which was specifically approved by the Supreme Court of Nebraska in an opinion that day rendered (Pl. Ex. 28A, R. 493, 851-854). The petitioner again consented to the permanent injunction against telling any person that he has a cause of action, the amount he should recover, where suit should be filed or doing any other thing that constitutes the practice of law in Nebraska, including conspiring with any resident or nonresident lawyer to violate the laws of Nebraska or the *Canons of Legal Ethics* (Pl. Ex. 28, R. 493, 848-849; Pl. Ex. 28A, R. 493, 852). Nebraska was the fourth state to bring action against Regional Counsel Lush[33] and the second to enjoin Regional Investigator Clinkenbeard.[34]

Robert A. Nelson, Special Assistant Attorney General in the Nebraska Case, testified in the case at bar (R. 498-529). He introduced as exhibits documents brought to light in the Nebraska proceeding that revealed the interrelation of petitioner's Grand Lodge, its Regional Counsel, Regional Investigators and its members, laying bare the actual purpose and result of the Legal Aid Plan and the way in which it operated, including the secret financial records of the Legal Aid Department known only to President Kennedy and Chief Clerk Maher (R. 698-699) and wholly unknown to petitioner's General Secretary and Treasurer, W. E. B. Chase, who had knowledge only as to the "so much money, fifty or one hundred thousand

[33] See footnote 26, p. 21.

[33] See footnotes 19 and 26, pp. 17 and 21.

[34] See footnote 26, p. 21.

dollars, or whatever it is, at the end of the year, that goes into our books as from the Legal Department" (R. 597, 602, 630-631, 698-699).

Marko Verbon, a Regional Investigator, testified in the Nebraska case (Pl. Nelson Ex. K, R. 521, 1048-1071). Verbon was himself injured in 1948 while an active trainman. His case was solicited and handled by a Regional Counsel. After its settlement, he was employed by that firm to bring in legal business at the flat rate of $200 per case, shortly increased to $300 because of his efficiency. During that period, prior to 1951, he was the front-man who prepared the build-up for the Regional Investigator to move in and sign up the case. He was later appointed Regional Investigator and assigned to Davis, Rerat, Yaeger and Lush and in 1956 was put on the Brotherhood's payroll (Pl. Nelson Ex. K, R. 521, 1049-1054; Pl. Chase Ex. J, R. 652, 1308-1309; Ex. 32 with Pl. Nelson Ex. M, R. 522, 1085). Notwithstanding his appointment as Regional Investigator for the Brotherhood, carrying a regular investigator's card signed by President Kennedy, he never made an investigation. His sole job was "to sign them up". The four other Regional Investigators assigned to that firm had the same special function. His instructions as Regional Investigator were "to use the lodge officers to help me to get business, sign contracts". The notice of injury or death in Brotherhood cases came from Chief Clerk Maher of the Legal Aid Department at the Grand Lodge to both Regional Counsel and Regional Investigator (Pl. Nelson Ex. K, R. 521, 1055-1057, 1068-1069, 1071-1072).

The lodge officers and members that were used by the Regional Investigators "to get business" were called "bird-dogs". Their compensation for that service to the Regional

Investigator varied from a high of $1500 per case to as little as $50 per case. For example, in the claim of Donald Bauer, handled by Davis, Rerat, Yaeger and Lush in 1953, the Regional Investigator, Gail Clinkenbeard, was paid a clear commission over and above expenses of $2662.50 and the "bird-dog", D. G. Klein, an officer of the local lodge, received $1000 for taking his friend, Bauer, to see Regional Counsel (R. 523; Pl. Nelson Ex. I, R. 519, 1038-1040, 1046); in the case of Leo E. Fry, handled by the same firm in 1955, Regional Investigator Gail Clinkenbeard's commission was $3076.67 and the three "bird-dogs" in that case received, one $1500 and the other two $100 each (R. 522-523; Pl. Nelson Ex. J, R. 520, 1047). Other similar exhibits were introduced and explained by Verbon (Pl. Nelson Ex. K, R. 521, 1061-1070; Exs. 33 through 37 with Pl. Nelson Ex. M, R. 522, 1086-1090).

The Davis, Rerat, Yaeger and Lush partnership "broke up" in 1955. Out of that dissolution three individual firms resulted, each of which was named Regional Counsel for a part of the territory previously assigned by President Kennedy to the old firm (Pl. Nelson Ex. K, R. 521, 1054; Pl. Ex. 82, R. 660, 1023-1024, 1026).

It is also significant that the territory of each Regional Investigator was protected by the Brotherhood, just like the distributor of any other commercial commodity, to the extent that the commissions on all sales made, or cases signed up, in the territory assigned to a given Regional Investigator went to him whether made by him or by some other Regional Investigator. Pat Maroney, Gail Clinkenbeard and Glenn McNurlan were all Regional Investigators appointed by President Kennedy and assigned by him to Regional Counsel Davis, Rerat, Yaeger and Lush and

the splinter Regional Counsel resulting therefrom (Pl. Nelson Ex. K, R. 521, 1055). Maroney's activity had been called an aggravated violation of professional and ethical standards by the United States Court of Appeals for the Tenth Circuit.[35] Clinkenbeard was enjoined by both Iowa and Nebraska,[36] and McNurlan in Missouri.[37]. All three were on the Brotherhood's payroll and both Clinkenbeard and McNurlan remained on it until April 30, 1960 (Pl. Chase Ex. J, R. 652, 1268-1271, 1278-1281, 1282).

The proof in the Nebraska Case establishes that, by reason of the volume guaranteed by the Brotherhood's contract with its Regional Counsel, petitioner's members were represented on a 25% contingent fee as compared to a 33⅓% fee to non-craft persons, and the commissions to Regional Investigators was 10% on members' cases, where the "bird-dog" was available, against 15% in non-craft cases where the help of the "bird-dog" was not available (Pl. Nelson Ex. K, R. 521, 1057, 1060; Exs. 8 and 25 with Pl. Nelson Ex. M, R. 522, 1083, 1084).

The term "bird-dog" is explained by Nelson, Verbon and Marjorie Matson, Secretary in the office of Davis, Rerat, Yaeger and Lush (whose testimony corroborated Verbon in every respect. Pl. Nelson Ex. L, R. 521, 1072-1082). They were what the name implies, the means of locating the game and setting it up for the kill (R. 520; Pl. Nelson Ex. K, R. 521, 1052, 1070-1071; Pl. Nelson Ex. L, R. 521, 1074). The letters "BD" were used to indi-

[35] *Supra*, p. 16, and footnote 18, p. 16.

[36] *Supra*, pp. 21 and 24, and footnote 26, p. 21.

[37] *Supra*, pp. 22-23, and footnote 26, p. 21.

cate payments to the "bird-dog" on the records of that Regional Counsel (Pl. Nelson Ex. L, R. 521, 1080-1081).

Another interesting element of proof in the Nebraska Case is the undenied fact there shown that George Rerat, Chief Regional Investigator for the law firm of his brother, Eugene Rerat (Davis, Rerat, Yaeger and Lush), was for some time known to Verbon only as George Sullivan and that the lawyer brother only later permitted the investigator brother to reveal his true identity (Pl. Nelson Ex. K, R. 521, 1050, 1052). Verbon's pay checks, when his commissions exceeded his regular Brotherhood salary, were from the Interstate Investigation Bureau, an office occupied by "nobody" and to which George Rerat had a key. Those checks were signed by Regional Counsel Rerat's secretary under the printed signature of his sister, G. Welch (Pl. Nelson Ex. K, R. 521, 1067-1068). George Rerat was the Regional Investigator who kept the solicitors for his firm on their toes:

> "Well, boys, we've got to get more business. We have to dig down in our jeans to keep this office going" (Pl. Ex. K, R. 521, 1056).

George Rerat was paid by the Legal Aid Department through April 30, 1960 (Pl. Chase Ex. J, R. 652, 1290-1293).

Both President Kennedy and Chief Clerk Maher of the Legal Aid Department testified in the second California case involving Regional Counsel Hildebrand.[38] Their testi-

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[38] *So. Pac. Co.* v. *Clifton Hildebrand et al* (1960), No. 727273, Superior Ct. Los Angeles County, Calif.; Pl. Ex. 77, R. 588, 960-981; Pl. Ex. 78, R. 588, 981-1002. See also footnote 20, p. 18.

mony was in conflict on an important fact. Kennedy testified that Regional Counsel Hildebrand made no money contribution to the Legal Aid Department after action was taken against him in the California courts (Pl. Ex. 77, R. 588, 974). Maher contradicted this, saying that the regional investigators associated with Hildebrand's office did the paying for him. In each of those years Hildebrand's assessed pro rata share of the department's expense was paid by a cashier's check and credited to Hildebrand's account. Maher frankly conceded: "I don't give a damn where the money came from as long as it came in" (Pl. Ex. 78, R. 588, 990-991). It appears that Kennedy relieved Hildebrand from his position as Regional Counsel *only* in those states which had obtained injunctions against him and Mr. Kennedy spoke more truth than he perceived with reference to the consent decree of injunction in Texas.[39] "I know we consented to the decree—but the provisions of the decree have long since been forgotten" (Pl. Ex. 77, R. 588, 968).

Proceedings were also instituted in Michigan against petitioner in January of 1959,[40] in which it made a most revealing admission that the Brotherhood, itself, continued to reimburse its representatives at their hourly rate of pay, plus expenses for the time involved, "in bringing injured employees or the survivors of the deceased employees to the offices of the Regional Counsel," "up to and including the 31st day of March, A.D. 1959," the very last hour before its professed day of reformation, April 1, 1959 (Pl.

[39] See footnote 17, p. 16.

[40] *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen, et al* (1959), Cir. Ct. of Jackson County, Mich., No. T-640.

Ex. 31, R. 497, 880, par. 6, 883, par. 5). One cannot resist comment upon the appropriateness of the day picked.

Proceedings against petitioner have since been commenced in Montana and New Mexico.[41]

THE OPERATION OF THE PLAN IN VIRGINIA

Virginia lies in the territory (West Virginia, Maryland, District of Columbia and Virginia, R. 61) allotted by the Legal Aid Department to Bernard M. Savage, a Baltimore lawyer who was appointed Regional Counsel by President Whitney in 1937 and who has served in that capacity from then until now. The appointment letter prescribes the terms of Savage's employment to which he subscribed by initialing a copy of the Rules and Regulations governing Regional Counsel and the Brotherhood in effect in 1937 (Pl. Ex. 32, R. 530, 884; Pl. Ex. 33, R. 530, 884-887; Pl. Ex. 34, R. 530, 887-888; Pl. Ex. 35, R. 531, 888-891). The appointment letter reminded Savage of the fee arrangement specifically prescribed in the then existing Rules and Regulations (not set out in the original Rules and Regulations of 1930, Pl. Ex. 5, R. 445, 760-763), of his obligation to see that the Legal Aid Department got its 6% share of all gross recoveries, furnished him sample contracts for employment and forms of letters to obtain assignment of the Brotherhood's 6%, and made it "clearly understood" that all cases involving members were to "be

[41] *Ryan et al v. Brotherhood of Railroad Trainmen, et al*, 32966, D.Ct. 13th Jud. Dist., Yellowstone County, Montana; *State Board of Bar Exam. v. Rutledge et al*, No. 78625, D. C. of Bernadillo County, New Mexico.

considered as Brotherhood cases", entitled to the discount rate, whether they are "brought directly to the Regional Counsel by the claimants themselves or by officers or members of the Brotherhood, as well as those which are referred to counsel by the Department." This latter caution was deemed necessary "because we are advising our members that they may go directly to counsel if they choose, rather than to take the matter up with this Department" (Pl. Ex. 33, R. 530, 886). Savage got a less favorable break on his fee splitting with the Brotherhood than some others, Savage's type of contract being deemed "just a little more advantageous from our standpoint" (Pl. Ex. 17 (c), R. 465, 820). Savage was continued in office by Kennedy on October 12, 1949 (Pl. Ex. 36, R. 531, 892; Pl. Ex. 37, R. 531, 893).

The pattern of the Brotherhood's activity in Virginia through its Regional Counsel Savage is clearly shown by correspondence between him and the Legal Aid Department relative to the operation of the plan in Virginia prior to April 1, 1959 (Pl. Ex. 42, R. 534, 894-895; Pl. Ex. 42A, R. 534, 895; Pl. Ex. 44, R. 534, 896; Pl. Ex. 50, R. 535, 897; Pl. Ex. 50A, R. 535, 898; Pl. Ex. 50B, R. 535, 899; Pl. Ex. 62, R. 537, 899-900; Pl. Ex. 62A, R. 537, 900). This correspondence discloses the persistent methods employed by the Brotherhood to insure that Regional Counsel Savage got the Virginia business. For example: the local lodge Secretary at Victoria, Virginia, was admonished on March 14, 1955, by Maher, the Chief Clerk, "to contact Brother Carson" recently injured and Savage was employed the next day (Pl. Exs. 42, 42A, R. 534, 894-895); a similar instruction, given to the Secretary of an Alexandria lodge about Brother Fauntleroy on August 10, 1954, proved less effective, the reason for which Savage ex-

plained on August 17, 1954, with the assurance that the Brotherhood's General Chairman on the RF&P Railroad felt "sure that the Department would handle the case" which it did as shown by Savage's letter to Maher of November 26, 1954, that "Brother Fauntleroy *has employed the Department*" (Pl. Exs. 50, 50A, 50B, R. 535, 897, 898, 899. Italics ours); and Maher complained to Savage on June 19, 1958, of a two months' delay in signing up Brother Smith and Savage was finally able to advise on August 15, 1958, "that Brother Smith has employed the Department to handle his claim," enclosing a copy of the contract (Pl. Exs. 62, 62A, R. 537, 899-900).

Petitioner furnished on demand a list of cases handled in Virginia under the plan by Regional Counsel Savage from May 14, 1956 to April 1, 1959 (Pl. Ex. 67, R. 584, 901). Petitioner also furnished on May 11, 1960, pursuant to similar demand, the amount paid by Regional Counsel Savage in the years 1955 through 1958 toward the maintenance of the Legal Aid Department based on the total amount of business done for the year in all states (R. 9-10). It should be noted that petitioner's answer to that demand asserts that there were no payments for 1959, that the figures for 1954 were "not available", and that "no amount has been contributed or will be contributed after April 1, 1959" (R. 9). Yet, plaintiff's Nelson Ex. A (R. 504, 1028) shows that Savage did contribute $2722.50 in 1954 and plaintiff's Chase Ex. H (R. 647, 1245-1248) shows that Savage paid to the Brotherhood through the Legal Aid Department on August 19, 1959, the sum of $6800.

Regional Investigators Norris W. Tingle and R. T. Miller were assigned by President Kennedy to Regional

Counsel Bernard M. Savage. They carried Regional Investigator cards signed by Kennedy and were paid by the Brotherhood, Tingle through April 30, 1960, and Miller through September 15, 1959, when he retired (R. 69-72; Pl. Chase Ex. J, R. 652, 1283-1285, 1304-1307; Pl. Chase Ex. H, R. 647, 1248).

President Kennedy testified that Savage handled the Brotherhood's Virginia cases pursuant to the plan prior to April 1, 1959, and that there was no Legal Counsel now serving Virginia "because of this lawsuit" (R. 61, 87-88). He said that: "We tried to do in Virginia what we did in West Virginia. We authorized Mr. Savage to make his disposition of his particular case in West Virginia" (R. 88). Pursuant to that authority Savage tacitly agreed with the Unlawful Practice Committee of the West Virginia State Bar that he had engaged in the unlawful practices charged and expressly agreed that neither he nor petitioner's Regional Investigator Tingle would engage in them in the future. That agreement of June 10, 1958, also contained the assurance that Regional Counsel Savage would not *participate or conspire* with any person in any unlawful practice (Pl. Ex. K-6, R. 114, 140-143).

The cessation of activity in Virginia "because of this lawsuit" falls in exactly the same pattern as petitioner's alleged cessation in Ohio in 1932 and admitted continuance in other areas outside Ohio pending the *Dworken Case*.[42]

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[42] *Supra*, p. 10, and footnote 5, p. 10.

THE PLAN AFTER APRIL 1, 1959

Petitioner claims (PB 17-18) that the Illinois decree[48] permits it to investigate injuries to its members, to make those investigations available to its members, to advise its members to employ counsel and to give the names of competent lawyers (PB 17). Petitioner agrees that the decree prohibits carrying contracts or photocopies of settlement checks, any financial connection between petitioner and Regional Counsel, contributions by Regional Counsel to the department or to any officer or member for procuring cases, and control by the Brotherhood of fees charged to its members (PB 17-18).

The petitioner agrees in the case at bar that the admitted objectionable practices of the Legal Aid Plan are enjoined by the Illinois decree. Once more the Brotherhood protests reformation since the Illinois decree, that "we haven't been in violation of any Court's ruling", and that it is "living up to the practices [of the Illinois decision] now in 50 states" (PB 18-19; R. 57, 6-10, 435; Pl. Ex. 77, R. 588, 963; Pl. Ex. 78, R. 588, 1001-1002). The proof shows the contrary.

Right in the State of Illinois, which had given petitioner more than a year to put its house in order, petitioner violated all of the prohibitions with respect to a member who was not injured until August 13, 1959, a month and a half after the deadline fixed by the Illinois Court (R. 191-219, 193); Petitioner's local lodge chairman, Harmon, made an unsolicited call on the injured member, Paul Hodges, in

[48] *In re Brotherhood of Railroad Trainmen* (1958), 13 Ill. 2d 391, 150 N.E. 2d 163.

the ward of the Marion hospital, 25 miles away, the day after he had lost a leg, advised him to sign a contract with the Legal Aid Department, assured him that the department could get him a recovery as high as $173,000, guaranteed that the department's lawyers in Chicago would not take more than 25%, and said that if he did not "go through legal aid I [he] would wind up getting nothing out of it" (R. 193-196). On the third day after the accident the treasurer of the local lodge, Morris, also made the 25 mile trip for a friendly chat (R. 196). On the fifth day Hodges was transferred to a hospital at his home in Anderson and Harmon again visited him there, going through the same routine (R. 196).

In October Hodges had been discharged from the hospital and Harmon visited him daily at his home, urging him to sign up, until Mrs. Hodges ran him away. During that period Harmon called Regional Counsel Henslee in Chicago on Hodges' telephone in Hodges' presence telling Henslee that he would need an advance of expenses in order to bring Hodges to Chicago, which Harmon said Henslee was supposed to provide. The next morning Hodges refused to go, the persistence of petitioner's local lodge chairman having made Hodges a "nervous wreck" (R. 197-200, 203).

During that period Morris paid several visits and asked if he could bring R. M. Crago, the General Chairman of the Brotherhood on the New York Central Railroad located in Indianapolis, Indiana (R. 200). Crago and Morris later visited Hodges together. Crago reiterated everything that Harmon had said and presented a written contract

for Hodges to sign "to get the legal aid to take my [his] case." Hodges refused (R. 201-203).

A retired Brotherhood member, Fred Weber, also worked on Hodges to sign up with "legal aid in Chicago" (R. 202-203).

President Kennedy admitted knowing all the persons involved in the solicitation of Hodges' case, except the particular Weber named (R. 80-81).

Crago was on the petitioner's payroll through October 15, 1959 (Pl. Chase Ex. J, R. 652, 1272-1274) and Regional Counsel Henslee made substantial payments to the Legal Aid Department through April of 1960 and paid the Department specifically for Crago's services as a Regional Investigator into October, 1959 (Pl. Chase Ex. F, R. 647, 1200-1204, 1209-1212; Pl. Chase Ex. H, R. 647, 1233-1234, 1240, 1241-1242; Pl. Chase Ex. J, R. 652, 1272-1274).

It is disturbing in the light of petitioner's insistent reliance upon the Illinois decree, to find in paragraph 3 of its motion to strike the deposition of Paul Hodges the startling statement: "and the defendant does not know what practices constitute the unauthorized practice of law in Illinois State" (R. 21-22).

In Ohio, where the plan had twice been condemned,[44] petitioner solicited its member, Dewey McLaughlin, who was not injured until February 19, 1960, to employ its Regional Counsel Henslee (R. 145-147, 155, 161). In that situation Emmett Adley was the "bird-dog" who brought in Don Taylor, a Regional Investigator assigned to Re-

[44] See footnotes 4 and 5, pp. 9 and 10.

gional Counsel Henslee, who was on the Brotherhood's payroll through April 30, 1960 (Pl. Chase Ex. J, R. 652, 1300-1303). President Kennedy thought he knew Adley and definitely identified Taylor (R. 82). Henslee also paid the Department specifically for Taylor's services as a Regional Investigator through April 30, 1960 (Pl. Chase Ex. F, R. 647, 1209-1212). Henslee's substantial contributions to the Department through April 1960 have already been noted above (Pl. Chase Ex. F, R. 647, 1200-1204; Pl. Chase Ex. H, R. 647, 1233-1234, 1240, 1241-1242).

Again the petitioner pleaded ignorance of "what practices constitute the unauthorized practice of law in Ohio State" notwithstanding two previous condemnations of the plan by that state (R. 19, par. 2; *supra*, pp. 9-11).

On June 13, 1959, Lawrence Troxtell was injured at Indianapolis. The employment of Regional Counsel for this man was solicited by local lodge chairman George Rummel, the "bird-dog", and by Regional Investigator Robert M. Crago who took him to Chicago where he was signed up by the Henslee firm.[45] Rummel paid all of Troxtell's expenses. Crago explained the advantages of signing up with the Department, cash advances, medical treatment, and the 25% contingent fee (R. 346-354). Rummel was later killed and the local lodge president, George Agal, took over the follow-up duties (R. 354; Pl. Ex. 73B, R. 586, 952). Regional Counsel Henslee's firm did advance cash for living expenses (R. 355, 357). Troxtell's wife confirmed her husband's testimony (R. 337-345).

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[45] Crago is the same Regional Investigator who solicited Paul Hodges for the same Regional Counsel, Henslee, *supra*, pp. 35-36.

Clifford Olson, a member of the Brotherhood, lost a leg in a railroad accident on July 17, 1959 (R. 163, 179-180). Within three or four days thereafter Jerry Ballieu, a fellow lodge member (the "bird-dog"), and Regional Investigator Gail Clinkenbeard,[46] known to President Kennedy (R. 81), came to the hospital to advise him of his right to use the Legal Aid Department and of the competency of Regional Counsel, Davis and Lush.[47] After other visits at the hospital, Olson signed a contract at his home, having been informed that the Lush firm could "get more money" (R. 163-166). Regional Investigator G. A. McNurlan also participated.[48] This contract was delivered to Clinkenbeard who carried it to the Lush firm (R. 166). Olson's wife confirmed the facts and further stated that she typed the contract to employ the Lush firm at Mr. Clinkenbeard's dictation in her home (R. 167, 179-183). Mrs. Olson insisted on inserting in the contract the right reserved to her husband to negotiate directly with the railroad, which he later exercised (R. 181, 173).

Both Clinkenbeard and McNurlan were on petitioner's payroll as Regional Investigators through April 30, 1960 (Pl. Chase Ex. J, R. 652, 1268-1271, 1278-1281). Regional Counsel Lush paid the Department $10,450 on March 31, 1960 (Pl. Chase Ex. I, R. 648, 1264; Pl. Chase Ex. F, R. 647, 1204). Lush paid petitioner for the services of

[46] The same Gail Clinkenbeard was enjoined in Iowa and Nebraska. *Supra*, pp. 21 and 24, and footnote 26, p. 21.

[47] The same law firm or splinter therefrom enjoined in four states and severely criticized by the Tenth Cir. Ct. of Appeals. *Supra*, pp. 16, 21-28 and footnotes 18, 19 and 26, pp. 16, 17 and 21.

[48] The same McNurlan who was enjoined in Missouri. *Supra*, pp. 22-23 and footnote 26, p. 21.

Clinkenbeard and McNurlan through April 30, 1960 (Pl. Chase Ex. F, R. 647, 1217-1218).

Elmo Loman was injured in San Francisco on June 29, 1960 (R. 297). Loman later went to the Brotherhood office to inquire about dues and insurance, where he talked to Stanley Rider, local lodge chairman and also legislative representative (R. 298-299; Pl. Ex. 74A, R. 587, 955). Rider "said he would like to send someone out" and on July 5 or 6, 1960, Harry Dragmire[49] arrived. Dragmire was the Regional Investigator assigned to Regional Counsel Hildebrand, well-known by Kennedy, and was paid by the Brotherhood through April 30, 1960 (R. 83, 299-300, 284; Pl. Chase Ex. J, R. 652, 1275-1277; Pl. Chase Ex. F, R. 647 1213-1214). Dragmire urged Loman and his wife to sign up with Hildebrand, promising a 25% attorney's fee, cash advance of $350 a month until settlement and medical specialists, and brought out a written agreement for signature (R. 300-304, 284-286). Dragmire also told of large verdicts and settlements that Hildebrand had obtained for other Brotherhood members and suggested that Loman's case was worth around $45,000 (R. 301-286). Dragmire called several times thereafter (R. 305).

Again petitioner protested that it did not know what constituted the unauthorized practice in California (R. 15), notwithstanding the 1950 *Hildebrand Case*[50] as well as the then pending case in California.[51]

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[49] Dragmire was one of the two Regional Investigators assigned to Hildebrand (R. 705) who forwarded Hildebrand's contribution to the Legal Aid Department while Hildebrand was under investigation. *Supra*, p. 29.

[50] See footnote 15, p. 15.

[51] *Supra*, pp. 28-29, and footnote 38, p. 28.

Regional Counsel Hildebrand continued to pay substantial sums to the Brotherhood through its Legal Aid Department until April 1, 1960 (Pl. Chase Ex. F, R. 647, 1200-1204). Shortly prior to Loman's deposition Dragmire and Rider sought him out and attempted to persuade him to change his story; otherwise, Rider would get in trouble (R. 305-308). Rider was the "very good friend" and "bird-dog" in the case (R. 311).

Kenneth Gibson of Iowa (R. 280-282), James Garwood of New York State (R. 417-418), and Charles Clark of Philadelphia (R. 259-260), all gave written statements that the retainer contracts entered into by them with the respective Regional Counsel assigned to their respective territories had been solicited by officers of the Brotherhood. Their testimony varied from the written statements in that respect. Once more petitioner pleaded ignorance of what constituted the unauthorized practice of law in Iowa (R. 16), apparently overlooking its consent to the injunction entered in the *White Case*.[32]

Jimmie Doyle Queen, of Cedar Town, Georgia, a trainman on the Central of Georgia Railroad and member of the Brotherhood, was killed on June 24, 1959. Two days later his widow gave birth to their child (R. 538-539, 540-541, 553-554, 571-572, 577). On her return from the hospital about July 1 or 2, 1959, Regional Counsel Tom Lewis, Jr., of Atlanta, Georgia, appeared at her home and solicited her case, asking her to sign an employment contract (R. 554-555, 539-541, 571-572, 577-578; Pl. Ex. 82, R. 660, 1025).

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[32] See footnote 26, p. 21.

On July 4, 1959, B. G. Byington, General Chairman of the Brotherhood for the Central of Georgia Railroad, arrived and solicited her case for A. L. Rives, Regional Counsel at Birmingham, Alabama (R. 542-544, 556, 571-572; Pl. Ex. 73A, R. 586, 949-950; Pl. Ex. 73B, R. 586, 953). Byington came back several more times (R. 545, 557, 571-572, 578). Byington made known his connection with the Brotherhood, exhibited copies of clippings, cancelled checks and photocopies of settlements to prove his assurance that Regional Counsel Rives could "get much more money than anybody around here could get" and offered to take the widow, her mother and her baby to Birmingham in his Cadillac car at his expense (R. 556-557, 543-546). He stayed two hours on the first visit and 30 minutes on each of the others (R. 544-545). Parker Whitfield, who also worked for the Railroad, was the "bird-dog" and introduced Byington (R. 546, 562). Byington wrote the widow on June 29, 1959, expressing the Brotherhood's sympathy to the widow of Brother Queen and informing her that he would arrive in Cedar Town shortly and would discuss her affairs, including "an annuity paid monthly for you, and as I understand, a child soon to be born" (R. 560-561). Even this entree, the help of the "bird-dog" and Byington's insistence did not produce a contract for Regional Counsel Rives. At Byington's request, the widow advised him when she changed her address (R. 558).

Not only did solicitation continue according to the original plan after April 1, 1959, but the Queen case demonstrates the evils inherent in the Legal Aid Plan when avarice for the big cases results in internal strife, violation of assigned territories and competition among Regional Counsel themselves.

The books of the Legal Aid Department, now called Department of Legal Counsel (R. 5), show that payments to the Brotherhood by all Regional Counsel, now called Legal Counsel (R. 5), continued through April 30, 1960, at which point bookkeeping by the Department apparently ceased (Pl. Chase Ex. F, R. 647, 1200-1232; Pl. Chase Ex. H, R. 647, 1233-1261; Pl. Chase Ex. I, R. 648, 1262-1264). In the year 1959, the year in which petitioner claims that all financial connection between Legal Counsel and the Brotherhood and its Legal Aid Department *were eliminated* as of April 1, 1959 (R. 7, 9, 51-52, 434, 436) and that no payments had "been received by the Brotherhood and credited to the account of these legal counsel since April 1, 1959" (Pl. Ex. 78, R. 588, 1001), the financial statements of the Brotherhood for that year, 1959, relative to the department show receipts from Regional Counsel in the amount of $158,080.06, only $41,351.33 of which was paid in before April 1, 1959, as compared to $156,902.27 for the year 1958, an increase of $1,177.79 (Pl. Chase Ex. L, R. 666, 1323; Pl. Chase Ex. F, R. 647, 1200). The same records show receipts from Counsel of $23,410.31 through the month of April, 1960, when those records ceased (Pl. Chase Ex. L, R. 666, 1324; Pl. Chase Ex. F, R. 647, 1203-1204). These figures were duly audited showing only slight discrepancies (Schedule 24, Pl. Chase Ex. K, R. 657, 1318, 1319, 1320).

Petitioner continued to advertise its Regional Counsel through its official publications and at open meetings where wholesale solicitation became obvious (Pl. Ex. 72, R. 586, 929-931). The Legal Aid Department, newly named the Department of Legal Counsel, continued after April 1, 1959, to be operated by the same Chief Clerk, C. R. Mosher, "under the direct supervision of President Kennedy" (Pl. Ex. 78, R. 588, 997).

President Kennedy continued to control the fees charged by Regional Counsel, now named Legal Counsel. While he no longer fixed them by contract he retained the power to remove counsel at will and admitted that he would exercise that power against any Regional Counsel who charged a member a fee greater than he considered proper (R. 108). It is significant that in the cases shown by the depositions arising after April 1, 1959, wherever the fee arrangement is mentioned, it is invariably the same wholesale rate of 25% (R. 194, 217, 274, 280, 285, 290, 304, 323, 334, 353, 363, 377, 379, 389, 390, 399, 418).

CONCLUSION ON THE FACTS

The protestations of reformation by the petitioner in the case at bar, as in the past, are plainly not in good faith. The Chancery Court did not need the gift of prevision to experience justifiable apprehension concerning the Brotherhood's future conduct.

ARGUMENT

PART I. THERE IS NO JURISDICTION TO REVIEW THIS CASE

The questions presented by petitioner (PB 2, 21, 47) and the subsidiary questions fairly comprised therein set forth no controversy. The decree of the Chancery Court (R. 25-28) affirmed by the Supreme Court of Appeals of Virginia (R. 35, 36) does not enjoin or restrain the petitioner from exercising the right asserted. The only right

claimed by the petitioner, regardless of derivation, is stated in these words:[53]

> "the right to make known to its members generally, and to injured members and survivors of deceased members in particular, first, the advisability of obtaining legal advice before making settlement of their claims, and second, the names of competent attorneys to handle such claims" (PB 2).

Substantially the same words are used throughout petitioner's brief (PB 2, 17, 21, 36, 38, 42, 45, 46, 47, 47-48, 58, 64).

It is thus plain at the outset that petitioner does not assert any right to engage in the acts prohibited by the Chancery Court's decree. That decree enjoins only (1) giving or furnishing legal advice, (2) solicitation by any means, directly or indirectly, of employment for any attorney, (3) controlling the amount of attorney's fees, (4) sharing in any manner in the legal fees of any lawyer or countenancing the splitting of such fees with any layman or lay agency, (5) any plan, pattern or design that results in channeling legal employment to particular lawyers, and

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[53] Petitioner did not assert this right in its original answer filed August 7, 1959 (R. 4-6). Its amended answer filed April 10, 1961, asserted the right "to advise injured members to consult or employ attorneys and doctors for the purpose of protecting their rights" (R. 12-13). That language was repeated in its motion to dismiss filed January 23, 1962 (R. 23). Petitioner assigned as error in the Supreme Court of Appeals of Virginia the failure to recognize its "right to inform its members to consult or employ attorneys" (R. 29). The petition to rehear in that court was silent on the point. The petition for certiorari employed for the first time substantially the words quoted (PC 7-8, 17, 18).

(6) violating the laws of Virginia governing the practice of law (R. 26-28).

There is no question in issue. The decree of the Chancery Court obviously does not touch the right asserted. There is nothing for the Court to decide and consequently no jurisdiction of this cause pursuant to 28 U.S.C.A., § 1257 (3) the sole basis on which the jurisdiction of this Court is invoked (PC 2; PB 2). The writ of certiorari should be dismissed as improvidently granted.

PART II. THE OVERRIDING STATE INTEREST

The practices enjoined by the Chancery Court decree are the following (R. 26-28): (1) giving or furnishing legal advice, (2) solicitation by any means, directly or indirectly, of employment for any attorney, (3) controlling the amount of attorney's fees, (4) sharing in any manner in the legal fees of any lawyer or countenancing the splitting of such fees with any layman or lay agency, (5) any plan, pattern or design that results in channeling legal employment to particular lawyers, and (6) violating the laws of Virginia governing the practice of law. None of the foregoing abridge the right asserted by petitioner.[54]

While the foregoing prohibitions have been expressed in statutes and in canons of ethics, their historical origins are found in the common law. Barratry, champerty and maintenance have always been reprehensible *per se*.

This Court recently recognized the validity of "Virginia's interest in regulating the traditionally illegal practices of

[54] See Argument, Part I, *supra*, pp. 43-45.

barratry, maintenance and champerty" and that "statutory regulation of unethical and nonprofessional conduct by attorneys has been in force in Virginia since 1849." That regulation prior to 1956 was there aptly described: "These provisions outlaw, inter alia, solicitation of legal business in the form of 'running' or 'capping'."

The majority opinion in *Button*[55] acknowledges the fact that the Virginia statutes regulating the legal profession and related aspects prior to the 1956 amendment merely embodied the traditional common law prohibitions which exist today irrespective of any statute.

Petitioner has expressed doubt concerning the basis for respondent's position. Petitioner is correct in asserting that respondent did not rely upon the statutes as amended by the 1956 Special Session of the General Assembly of Virginia[56] (PB 32). Respondent did rest its case, and now does, upon the traditional prohibitions of the common law, the Rules of the Supreme Court of Appeals of Virginia defining the practice of law and the Canons of Professional Ethics adopted therein, and the statutes collateral thereto then and now in force and effect.[57]

The crux of the majority opinion in the *Button Case* appears to rest in "the vital fact" that the Court viewed the practices there under consideration as a constitutionally privileged "form of political expression" to secure con-

[55] *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415, 9 L.Ed. 2d 405, 83 S.Ct. 328.

[56] See *N.A.A.C.P.* v. *Button*, footnote 55.

[57] See Statutes Involved, *supra*, pp. 2-5.

stitutionally guaranteed civil rights. In the case at bar the civil action for personal injury is clearly *not* "a form of political expression". It *is* expressly "a technique of resolving private differences" and specifically *is not* "a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local * * *." Nor is there any constitutionally guaranteed civil right involved.

In any event, the prohibitions of the Chancery Court decree fall within a class, consistently recognized by this Court, in which "a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms". This Court has also consistently recognized that the States may regulate the professions. *Dent* v. *West Virginia* (1889), 129 U.S. 114, 32 L.Ed. 623, 9 S.Ct. 231; *Semler* v. *Oregon State Board of Dental Examiners* (1935), 294 U.S. 608, 79 L.Ed. 1086, 55 S.Ct. 570; *Williamson* v. *Lee Optical of Oklahoma, Inc.* (1955), 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461. The States are the best judge of the regulations necessary in the interest of public safety and welfare. *Graves* v. *Minnesota* (1926), 272 U.S. 425, 71 L.Ed. 331, 47 S.Ct. 122.

The legal profession is the only profession whose conduct is controlled by the courts through their inherent power as well as by State regulation. This Court, at the summit of the judicial system, should have special interest in maintaining the standards of the legal profession particularly when the practices under its scrutiny are repeatedly and brazenly employed to violate those standards.

Each of the prohibitions of the Chancery Court decree is a proper exercise of Virginia's right to regulate the

practice of law, conceded by petitioner (PB 43), that overrides the First and Fourteenth Amendment freedoms.

Petitioner makes no contention that it has a right to *give legal advice* notwithstanding President Kennedy's testimony that petitioner actually does so (R. 63). Condemnation of such activity by laymen or lay agencies is universal.

Petitioner agrees that *fee splitting*, enjoined by the decree, is an objectionable practice properly condemned by the Illinois decree with which it claims compliance (R. 5-9; PB 12-13, 18). The evils inherent in fee splitting are self-evident and standing alone are a sufficient basis for the State's overriding interest.

The prohibitions of the decree against *furnishing legal advice* and *controlling the amount of legal fees* both involve the presence of a lay intermediary specifically dealt with in Canon 35.[38] Although the narrow right asserted by petitioner does not touch this aspect of the matter,[39] and although the Illinois decree, with which petitioner claims compliance, enjoins it (PB 18), petitioner argues that its interest "in its members is personal, not pecuniary" (R. 20) and insinuates that this Court should adopt a theory similar to that of Justice Traynor and Mr. Drinker and approve petitioner's Legal Aid Plan on the ground that there is no conflict of interest between the Union and the injured member or other abuse such as to bring into effect Canon 35 (PB 28-29, 58-59). That effort to bring the case at bar under the *Button* decision necessarily fails because the majority opinion in *Button* plainly states that "Objection

[38] *Supra*, pp. 4-5.

[39] See Argument, Part I, *supra*, pp. 43-45.

to the intervention of a lay intermediary * * * also derives from the element of pecuniary gain", an element which plays so prominent a part in the multi-million dollar personal injury business enjoyed by petitioner's sixteen or seventeen chosen counsel. These lawyers hold that lucrative status subject to the pleasure of one individual only, the President of the Brotherhood (R. 40). President Kennedy testified that he would remove any Regional Counsel who did not operate or charge fees to suit him and agreed that he exercised control over them "at least to that extent" (R. 108). There can be little doubt of the conflict in loyalty to the source of the guaranteed volume that warrants the continued[60] cut-rate (Pl. Ex. 35, R. 531, 888) and to the needs of the individual client in the individual case.

The Chancery Court decree further enjoined *solicitation* and *channeling legal employment*, the latter being the result of effective group solicitation (R. 27-28, 26).

The term "channeling" proves especially annoying to the petitioner (PB 14, 40, 52-54) because it is the indispensable element without which the Legal Aid Plan cannot "give regional lawyers a reasonable assurance of a sufficient volume of Brotherhood business to warrant the rendering of proper service on the basis of compensation agreed upon" (Pl. Ex. 35, R. 531, 888), i.e. the advertised "wholesale rates" available to members only and constituting an inducing cause for trainmen to join the Brotherhood (PB 53), and thereby establish the monopoly originally envisioned (Pl. Ex. 17 (c), R. 564, 824).

Solicitation of legal business has been condemned from

[60] The 25% rate continued after April 1, 1959. See *supra*, p. 43.

the beginning of the legal profession and its traditional prohibition is embedded in the common law. The majority opinion in the *Button Case* appears to excuse solicitation in that case on the theory that the activities of the N.A.A.C.P. sought "to achieve legitimate political ends" by "a form of political expression", devoid of any financial interest and protected by the First and Fourteenth Amendments. Petitioner's activities seek no *political* end nor the attainment of any constitutionally guaranteed civil right. The enormity of the financial interest disclosed by the record in the case at bar is undenied.

Petitioner's present attitude on the matter of channeling legal business comes as a distinct surprise in view of its counsel's opening declaration to the Chancery Court: "The respondent alleges that it has the legal right, it has the constitutional right to advise with its members, give them any information it has, and also to advise lawyers generally or specifically, *but not to channel business. I don't think it has that right*" (R. 436-437. Italics ours).

The Virginia *laws governing the practice of law* on which respondent relies are narrowly drawn and embody definitions well understood and accepted for centuries. Running, capping, solicitation and maintenance are terms of the common law, the meaning of which have not heretofore been deemed vague or overbroad. The Virginia Bar relies upon no enlarged legislative definition of them which can be thought by anyone to have been directed at any particular political group, racial or otherwise. The majority opinion in *Button* limited its position on the right of the State to regulate the solicitation of legal business to the activities of the N.A.A.C.P. "shown on this record" which were considered "modes of expression and association pro-

tected by the First and Fourteenth Amendments." Otherwise, it found no fault with the Canons of Ethics declaratory of the traditional restraints of the common law.

PART III. THE FEDERAL RAILWAY LABOR ACT

The Federal Railway Labor Act, 45 U.S.C.A., §§ 151-163, has not the remotest relevancy to any aspect of the case at bar.

At the outset the Court is reminded that petitioner claims nothing more from the Railway Labor Act than support for "the right to make known to its members the advisability of obtaining legal advice and to make known the names of competent counsel in connection with rights of members under The Federal Employers' Liability Act, notwithstanding any rule or doctrine of State Law" (PB 47-48). This is the only right that petitioner asserts (PB 2, 17, 21, 36, 38, 42, 45, 46, 47, 47-48, 58, 64). The decree of the Chancery Court does not touch the right claimed, as shown in Part I of the Argument, nor is it in conflict in any respect with the Railway Labor Act.

Notwithstanding the foregoing definite statement of the right claimed, so many times asserted, petitioner insinuates into his argument the insidious idea that the Railway Labor Act really grants petitioner the right to practice law for its members in the courts. Petitioner attempts that conclusion by distorting the historic meaning and intent of the word "grievances" as employed in the field of labor relations (PB 48-52). It cannot be imagined that, because jurisdiction to hear grievances is conferred by the Act upon the National Railroad Adjustment Board, the Congress intended also to confer upon that Board jurisdiction of

F.E.L.A. cases concurrent with the courts; much less an intention to authorize the Brotherhood to stand finally before this Court as its members' counsel. The only decision on this point,[81] dealt expressly with it at the instance of the Brotherhood and decided:

> "The Brotherhood defends its practices on legal grounds, and also argues that they are justified by policy considerations. As a matter of law it argues that its method of handling the personal injury and death claims of its members is permissible because under the Railway Labor Act the Brotherhood is authorized to represent its members, before the National Railroad Adjustment Board or other appropriate tribunals, in the processing of disputes growing out of grievances. (45 U.S.C. 152.) But these injury and death claims are not the kind of labor disputes that the statute contemplates. We find nothing to suggest that Congress intended by the Railway Labor Act, any more than by the Labor Management Relations Act, (29 U.S.C. 141) to overthrow State regulation of the legal profession and the unauthorized practice of the law." (13 Ill. 2d, at p. 395, 150 N.E. 2d, at p. 166.)

Petitioner accepted that decision, has urged it as the standard for its operations nationwide, heralded it as a "major victory", and has relied upon it throughout this litigation (PB 18; Pl. Ex. 72, R. 586, 927). Now, petitioner argues that the Illinois Court "committed basic and funda-

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[81] *In re Brotherhood of Railroad Trainmen* (1958), 13 Ill. 2d 391, 150 N.E. 2d 163.

mental error in so holding" and urges in support of this contention an example given by Justice Rutledge,[42] taken out of context and which, when considered in the light of the issues and the entire opinion, does not sustain the inference that petitioner seeks to draw therefrom (PB 51-52).

Petitioner ignores the issue that was before this Court in *E.J. & E.* v. *Burley*. The only issue there under consideration was whether the union had an exclusive right to represent its members before the National Railroad Adjustment Board which has jurisdiction only over the "second class" of claims referred to by Justice Rutledge which "contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." The succeeding discussion by Justice Rutledge in that opinion clearly shows that the words used by him and now relied on by petitioner, "e.g. claims on account of personal injuries", had no reference whatever to civil actions at law for monetary damages under F.E.L.A. for the injuries themselves. That language referred only to situations under existing collective bargaining agreements or situations omitted therefrom which emanate from and are incidental to the fact of such personal injury. The F.E.L.A. claim is "for" personal injury. The claim before the National Railroad Adjustment Board is a claim under the collective bargaining agreement or of the kind that might have been included in it that may be pointed up by or "on account of" a personal injury.

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[42] *E.J. & E. Rwy. Co.* v. *Burley* (1945), 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282.

The legislative intent expressed in 45 U.S.C.A., § 151a (5)[83] is plainly shown by the statement of Senator Watson, speaking in favor of the bill on May 6, 1926;[84]

> "* * * but the Board of Adjustment in that case [Ech-Cummins Act], as in this bill provided, had to do only with grievances—that is to say, with the interpretation and application of existing agreements as to wages, hours of labor and conditions of service —not as to wages, conditions of service, and hours of labor themselves, but as to the application and interpretation of existing contracts as to them."

Any other construction of the Act would of necessity deprive the carrier of the right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States. The interpretation of the Railway Labor Act urged by petitioner would permit a railroad employee plaintiff to present his F.E.L.A. claim to the National Railroad Adjustment Board where the facts are determined and subject only to judicial review. 45 U.S.C.A., § 153.

The respondent is unable to find any case in any court where the claim made under 45 U.S.C.A., § 151a (5) was an action for personal injury or death.

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[83] § 151a. "General purposes. The purposes of the chapter are: * * * (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

[84] 64 Congressional Record, 8,808

PART IV. THE ABSENCE OF GOOD FAITH

Petitioner has sought to clothe its activities with an aura of virtue by distributing at will throughout its brief sanctimonious declarations of innocence unsupported by any fact. This necessitated the detailed examination hereinabove made of the actual operation of its Legal Aid Plan since its inception 33 years ago in order that the decision of this Court may be based upon the whole truth concerning the Brotherhood's operations. Respondent fully appreciates and knows that the sufficiency of the evidence to sustain the injunctive relief awarded is a matter of local law and of no concern to this Court. At the same time it seemed necessary to show to this Court the true nature of this litigant which seeks unobtrusively to slip under the protective umbrella spread by the *Button Case* where it plainly does not belong.

Of particular interest on the question of good faith is petitioner's pretension that it is in compliance with the Illinois decision (R. 18) when the evidence clearly shows that it is not, not even in Illinois.[65] Even President Kennedy conceded that the claimed right to recommend competent counsel did not extend to persuasion or urging members to employ any particular lawyer. He agreed that taking a member to the attorney was wrong. The right to recommend according to Kennedy went no further than "he could just mention the attorney's name" (R. 60).

It should be obvious that the enormous volume of F.E.L.A. cases of Brotherhood members could not find their way to so limited a group of lawyers by the mere

[65] *Supra*, pp. 34-36.

exercise of the right claimed without the wholesale solicitation contemplated by petitioner's plan. The proof of the pudding is in the eating.

CONCLUSION

The real question presented by this case, if any, is whether the states have the right to maintain ethical standards in the practice of law as a profession or whether they may be required by this Court to relegate the practice of law to the level of commercial enterprise.

The writ of certiorari should either be dismissed as improvidently granted or the decree of the Chancery Court should be affirmed.

Respectfully submitted,

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